



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Zapata Gulf Marine Corporation

File: B-235249

Date: July 27, 1989

DIGEST

1. Where a firm initially filed an agency-level protest of contracting activity's refusal to extend closing date for receipt of proposals on the basis of insufficient time to submit offers, the agency's receipt of proposals on the scheduled closing date without taking any corrective action in response to the protest constitutes initial adverse agency action, such that a subsequent protest to the General Accounting Office (GAO), 3 weeks later, is untimely under GAO's Bid Protest Regulations.

2. Protest ground concerning solicitation impropriety apparent prior to the closing date for receipt of proposals is untimely where it is not filed before closing.

DECISION

Zapata Gulf Marine Corporation protests the Navy's refusal to extend the closing date of request for proposals (RFP) No. N00033-89-R-4002, for services to operate and maintain 12 Navy T-AGOS range instrumentation vessels. Zapata primarily contends that there was insufficient time for firms to submit their offers between receipt of a third set of written answers to questions concerning their solicitation and the closing date.

We dismiss the protest.

The RFP was issued on January 3, 1989, and provided that contractors' questions regarding the solicitation would be answered by the agency, and would be binding on the offerors, so long as they were submitted "in writing soon enough to allow a reply to reach all prospective offerors before the submission of their offers." The cover sheet to the RFP notified offerors that questions were to be submitted no later than February 17, 1989. The Navy issued two sets of written answers to offeror questions by March 15. Since a few contractors submitted questions late,

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including Zapata, which submitted 39 questions between March 18 and March 21, the Navy issued an additional set of 95 written questions and answers regarding the RFP on March 24, 7 days prior to the scheduled March 31 closing date. Zapata, alleging that it received these questions and answers on March 29, filed a written request for an extension of the closing date, which had previously been extended to March 31. The contracting officer received that request on March 30 and on the same date verbally denied the request and confirmed that rejection in writing. The record also indicates that the Navy denied extension requests made verbally by Zapata's legal counsel during the week prior to closing.

On the morning of March 31, Zapata filed a formal protest with the Navy against the agency's refusal to extend the closing deadline. The Navy reports that it reviewed Zapata's protest and proceeded with the scheduled closing for the receipt of proposals later that day. On April 19, nearly 3 weeks after the closing date, Zapata filed a protest with us that reiterated its agency-level protest grounds and challenged the propriety of the solicitation. The Navy issued a formal denial of Zapata's agency-level protest by letter of April 20. In response to the Navy's request that we dismiss Zapata's protest as untimely, Zapata resubmitted the identical protest grounds to our Office on May 3, referencing its receipt on April 21 of the Navy's denial of its protest. Each of the parties has been given the opportunity to submit its comments regarding the timeliness of Zapata's protest. Zapata argues that since it did not receive the Navy's denial of its protest in writing until April 21, its protest to us is timely. We disagree.


Where a protest initially has been filed with a contracting activity, any subsequent protest to our Office, to be considered timely under our Bid Protest Regulations, must be filed within 10 working days of "actual or constructive knowledge of initial adverse agency action." 4 C.F.R. § 21.3(a)(3) (1988). The term "adverse agency action" is defined in our Bid Protest Regulations to include the agency's proceeding with the receipt of proposals in the face of the protest. 4 C.F.R. § 21.0(f); Carlisle Tire and Rubber Co., B-235413, May 12, 1989, 89-1 CPD ¶ 457. Thus, it is our general view that the procuring agency's receipt of proposals on the scheduled closing date without taking any corrective action in response to an agency-level protest puts the protester on notice that the contracting activity will not take the requested corrective action and begins the running of the 10-day limitation period. Id.; Dock Express Contractors, Inc.--Request for Reconsideration, B-223966.2, Mar. 4, 1987, 87-1 CPD ¶ 243.

As our Office has indicated previously, we do not believe that filing an initial agency protest just a few hours before the deadline for receipt of proposals, as Zapata did, gives an agency a reasonable opportunity to act upon the protest except to either postpone the closing date or continue to accept proposals. In such circumstances, an agency's proceeding with the procurement without taking corrective action clearly constitutes initial adverse agency action. See Southwest Marine of San Francisco, Inc.--Request for Reconsideration, B-229654.2, Jan. 19, 1988, 88-1 CPD ¶ 49 (scheduled closing occurring less than 1 hour following filing of agency-level protest constitutes initial adverse agency action). Thus, Zapata's protest to our Office is untimely because it was filed more than 10 days after Zapata knew that the agency proceeded with the receipt of proposals on the scheduled closing date. In this regard, the date the Navy issued a written decision on Zapata's agency-level protest is simply irrelevant.

Zapata also argues in its protest to us that the solicitation is defective in two regards: first, since the RFP states that any necessary solicitation information given to the offerors would be in the form of a solicitation amendment, the agency's release of written questions and answers was inadequate and inappropriate;^{1/} and second, that the RFP's caution to offerors that award might be made on the basis of initial offers received, without discussions, is improper in light of the agency's alleged indications in its written answers issued prior to the closing date that it would issue a post-closing amendment. These protest contentions are untimely, however, since they concern alleged solicitation improprieties apparent prior to the closing date for receipt of initial proposals, and Zapata failed to file these protest bases prior to closing. 4 C.F.R. § 21.2(a)(1). Moreover, to the extent Zapata's agency-level protest does challenge the sufficiency of the agency's written questions and answers, or argues that the

^{1/} We note, in any event, that Zapata's argument that the agency failed to issue requisite amendments is faulty since we have repeatedly recognized that written questions and answers concerning a solicitation, which are issued by the contracting officer and furnished to all offerors, as here, meet the essential requirements for an amendment, and the information therein was therefore binding on all offerors. See Essex Electro Engineers, Inc., B-232675, Jan. 18, 1989, 89-1 CPD ¶ 44; Realty Ventures/Idaho, B-226167, May 18, 1987, 87-1 CPD ¶ 523.

agency failed to issue anticipated amendments, these contentions are untimely, as stated above, since Zapata failed to file its protest with our Office within 10 days of the closing date.



Ronald Berger
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